SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
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August 6, 2004

TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)

SUBJECT: **Staff Report and Recommendation on Bay Planning Coalition Comments**
(For Commission consideration on August 19, 2004)

Recommendation Summary

The staff recommends that after hearing from the public on the issues raised by the Bay Planning Coalition and considering the staff's evaluation of these issues, the Commission could take the following actions:

1. If the Commission concludes that the language of Bay Plan Subtidal Areas Policy #2 could be improved with minor refinements, the Commission should direct the staff to prepare for the Commission's adoption a descriptive notice that would initiate the process of considering a possible amendment of the Bay Plan.

2. The Commission should request that the Bay Planning Coalition take a far more active role in supporting BCDC's efforts to secure adequate funding to achieve BCDC's mission—a mission which the Coalition has indicated it supports.

3. If the Commission concludes that the process of gaining BCDC approval for maintenance dredging in the Bay should be further streamlined, the Commission could increase the time period for administratively authorized maintenance dredging from five years to ten years and could issue a regionwide permit to pre-authorize small dredging projects and "knock down" dredging.

4. If the Commission concludes that the staff is being overzealous or excessive in requesting information the staff believes is necessary to file a permit application, the Commission could direct the staff to make all applicants fully aware of Commission Regulation Section 10353, which allows anyone who has submitted an application that the staff believes to be incomplete to appeal directly to the Commission, which can overrule the staff, deem the application complete, and start the processing of the application.

5. If the Commission concludes that applicants are being unfairly burdened and unnecessarily delayed by having to provide too much information to complete a BCDC permit application, members of the Coalition, as well as the general public, should be urged to review BCDC's application form in detail to identify specific provisions that they believe are either unnecessary, redundant, obsolete, or in need of revision and to communicate their recommendations to the Commission when it considers revisions to BCDC's permit application form at a public hearing on September 2, 2004.

6. If the Commission concludes that inadequate staff resources are contributing to the perceived delays in the dredging program, when the Commission takes action on its two-year work program at the August 19, 2004 meeting, the Commission should approve the staff's recommendation that 0.5 personnel years of staff resources be redirected from the planning program to the dredging program even though this could further delay the update of the Bay Plan and will adversely impact other planning projects.

7. If the Commission concludes that the staff is being called upon to interpret Commission policy in too many permit decisions, the Commission could direct the staff to prepare revisions to the Commission's regulations that would reduce the size, category and range of projects that have been pre-authorized or can be authorized administratively. The staff does not recommend this action because it would lead to more projects requiring public hearings and votes by the Commission, which would result in delays to permit applicants and increase the staff's workload.

8. If the Commission concludes that applicants are being forced by the staff to accept unreasonable permit conditions, the Commission could direct the staff to make all applicants fully aware of: (a) Commission Regulation Section 10624, which allows an applicant who objects to any term or condition in an administrative permit to appeal the matter to the Commission; and (b) a permittee's right to apply to the Commission for a permit amendment that would revise the language of any conditions the permittee finds problematic after the permit has been issued. The Commission could also reinstate its practice of voting on permit applications at the meeting subsequent to the hearing on the applications as a way of providing applicants and the staff more time to thoughtfully negotiate permit conditions.

Staff Report

Background. On May 14, 2004, the Bay Planning Coalition released three letters, all alleging that the Bay Plan Subtidal Areas Policy #2, as interpreted by BCDC's staff, exceeds the Commission's authority, duplicates the authorities of other agencies, and poses a significant threat to Bay Area businesses.[1] One of the letters requested that the Commission revoke or substantially amend the policy. A second letter—to the Governor's Legal Affairs Secretary and the Director of the Office of Administrative Law—requested that approval of the policy be rescinded. The third letter—to the Governor's Assistant Cabinet Secretary—requested that the Commission be stripped of its authority to regulate sand mining, maintenance dredging, and routine repair and maintenance activities.

On May 28, 2004 the staff responded to the three letters,[2] explaining that the staff is not interpreting the policy in the manner described by the Bay Planning Coalition, but rather in a way that has resulted in no permit denials during the two years the policy has been in existence. Moreover, in asserting that BCDC duplicates other agencies' authorities, the Coalition had erroneously described some agencies as having authorities they do not have and claimed that BCDC has authority over activities the Commission does not regulate.

On July 14, 2004, Paul H. Dobson, Governor Schwarzenegger's Chief Deputy Legal Affairs Secretary, responded to the latter two letters, stating:

> *Executive Order S-2-03 did not call for the Governor's Legal Affairs Secretary or the Office of Administrative Law…to conduct any substantive review of previously enacted regulations. The Executive Order required agencies to review and reassess certain pending regulatory actions and completed regulatory actions, and required the agency secretaries and the Director of Finance to ensure that the review occurred. Executive Order S-2-03 does not give Legal Affairs or OAL any role with respect to the review and disapproval of BCDC regulations.…We understand that you are attempting to resolve your policy concerns with respect to the Subtidal Areas Policy through discussions with the staff of BCDC and through a public hearing process.*

At an informal meeting on June 4, 2004 between representatives of the Coalition and BCDC, Coalition members indicated that in addition to the Bay Plan Subtidal Areas Policy #2, their concerns encompassed their beliefs that BCDC overlaps and duplicates the roles of other agencies; there are unnecessary delays in BCDC's permit process; BCDC permits contain unreasonable conditions; and it is difficult to get BCDC approval for routine repairs and maintenance. The Coalition was invited to provide more detailed information to substantiate its concerns and to allow the Commission to assess what actions, if any, might be needed to address the stated concerns.

The Commission held public hearings on June 17, 2004, and July 15, 2004, to provide opportunities for the public to comment on this matter. At both hearings, Coalition members recommended that the Commission establish a special committee to meet with members of the Coalition to discuss their concerns. Representatives from a number of environmental organizations testified that they, and other stakeholders, should be involved in any such discussions, which might better be hosted by the entire Commission, rather than by a smaller committee.

At the June 17th hearing, the Coalition was again invited to provide more detailed information to substantiate the organization's concerns. In response, the Coalition submitted information,[3] on July 8, 2004, a week before the Commission's July 15th hearing. In order to allow time for a thorough staff analysis of the Coalition material and to provide the Commission and the

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[1] The three letters are found in Attachment A.

[2] See Attachment B.

[3] See Attachment C.

public with an opportunity to review the staff report, at the July 15th hearing the Commission directed the staff to: (1) evaluate the concerns and issues raised by the Coalition; (2) provide the evaluation to the Commission and the public; and (3) schedule a public hearing at the Commission's August 19, 2004 BCDC meeting, after which the Commission could determine how to best deal with this matter.

Introduction. In making its charges, the Bay Planning Coalition has failed to point out that its complaints come at a time when the Commission has had to deal with enormous budget and staff reductions. Over the past two years, budget cuts have reduced BCDC's authorized staff level from 47 at the end of fiscal year 2001-2002 to 32 this fiscal year,[4] a reduction of 15 positions or over 31 percent of BCDC's staff. State General Fund support for BCDC has been reduced $635,000, from $3,748,000 at the beginning of fiscal year 2002-2003 to $3,113,000 this fiscal year, a reduction of nearly 17 percent. To accommodate these reductions, a number of steps were taken to reduce expenditures[5] even though it was inevitable and predicted that these measures would have profound impacts on the effectiveness of BCDC's operations.[6]

In a further effort to "do more with less" and maintain BCDC's core functions and program effectiveness, the staff has employed a triage approach to managing workload. Highest priority is given to those responsibilities that have proven to be most effective in advancing BCDC's objectives. Those activities that can be deferred without immediate negative impacts on the Bay are being postponed. Everything else gets an even lower priority and is handled on a time-available basis. As a result, the staff places greater emphasis on processing permits than on responding to reports of minor violations. Planning projects are being postponed unless they are

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[4] Two of the authorized 32 staff positions are currently vacant.

[5] Some of the specific actions taken as a result of budget cuts include: (1) vacant staff positions have not been filled, and staff members have been laid-off; (2) discretionary operating expenditures have been eliminated or deferred; (3) all staff training expenditures have been eliminated; (4) the Commission's work program has been revised to eliminate or postpone projects and activities; (5) more than half the regularly-scheduled, twice-monthly Commission meetings have been cancelled; (6) attempts were made to renegotiate the Commission's office lease even though it does not expire until 2010; and (7) the hours BCDC's office is open to the public have been reduced from nine to six hours daily.

[6] The specific impacts that have been experienced include: (1) cancelled meetings have forced applicants to wait weeks for Commission consideration and action on their applications; (2) the number of staff available to handle permit work has been reduced 35 percent, which is preventing permits from being processed as quickly as in the past (yet still within the tight time deadlines set by state law); (3) the loss of a Bay Development Design Analyst position has resulted in a backlog of items on the Commission's Design Review Board agenda, which is delaying applicants and project review schedules; (4) when BCDC's sole staff engineer could not be replaced, the Commission lost the expertise it needs to address seismic safety, shoreline erosion and flooding issues; (5) the number of staff available to handle enforcement work has been cut 38 percent, reducing the Commission's capacity to detect and prosecute violators. As a result, fewer cases are being investigated each year and open investigations are languishing; (6) the number of staff available to handle dredging work has been reduced by two-thirds, which has virtually eliminated BCDC's award-winning dredging program and slowed the processing of dredging permits, which are, nevertheless, still being processed within mandated time periods; (7) the number of staff available to handle planning work has been reduced 38 percent, which has slowed the update of the Bay Plan policies that control what happens in and around the Bay; (8) reductions in BCDC's administrative services staff have compromised the implementation of state fiscal management and administrative procedures; and (9) budgetary factors, rather than public policy decisions, are determining how staff resources are allocated. Specifically, the availability of a grant or contract to pay for a particular project plays as much of a role in the allocation of staff resources as do Commission priorities.

supported with grant funds or reimbursements, in which case they are given more attention than detailed permit condition compliance monitoring, responding to state administrative directives, and responding to information requests from the public.

Despite these management initiatives, BCDC could not escape the negative impact of budget reductions. But, just as it would be illogical to blame the design of an automobile for poor performance when the car runs out of gas, the staff believes it is unreasonable for the Bay Planning Coalition to ignore BCDC's budgetary situation when assessing the Commission's performance.

Probably because the Coalition failed to acknowledge the budgetary plight faced by the Commission, the Coalition has not suggested that providing additional revenue to support BCDC's operations might help resolve some of their complaints.[7] The staff believes this oversight critically undermines the Coalition's conclusions and makes it appear that the Coalition's objective may not be to improve BCDC's effectiveness, but rather to undermine the regulatory framework applying to certain members of the Coalition. If this is not the case, the staff believes the Coalition should take a far more active role in supporting the Commission's efforts to secure adequate funding to carry out BCDC's mission, a mission which the Coalition indicates it supports.

Report Purpose and Organization. This report assesses and responds to over 50 pages of material submitted by the Coalition.[8] The staff's objectives in preparing this report are: (1) to allow the Commission to fully understand and carefully consider the issues raised by the Coalition; (2) to advance the public policy debate on these issues by providing context, the full facts, a broader perspective and an expanded explanation of the issues; and (3) to assist the Commission in coming to thoughtful and informed strategies that will improve the effectiveness and efficiency of BCDC's programs.

To achieve these objectives, the main body of this report does not sequentially respond to the Coalition's letters; however, a point-by-point response can be found in Attachment D. Instead, this staff report is organized around the five major categories of complaints which thread their way through the Coalition's letters. The staff has selected this organizational approach because it provides a more systematic way to address similar concerns expressed two or more times in the Coalition's material. Also, because the Coalition's material appears to reflect the individual opinions of various Coalition members, the views expressed are not

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[7] The Bay Planning Coalition is clearly aware that budgetary reductions are negatively impacting BCDC's operations. On April 7, 2003, at the invitation of the Coalition's executive director, BCDC's executive director and the executive officer of the Regional Water Quality Control Board met with the Coalition's executive council at a working retreat to discuss State budget cuts and to develop a strategy for dealing with them. At that meeting, the Coalition seemed to be giving serious consideration to funding positions at both the Board and BCDC, much like those funded by Caltrans, San Francisco International Airport, and the California Department of Fish and Game. The Coalition has not pursued this idea further.

[8] The Coalition material includes five letters submitted in early July, 2004, as well as attachments and references to three other earlier letters. The following abbreviations for the most recent letters are used in the staff report: (1) *"BPC,"* a July 7, 2004 letter from Ellen Joslin Johnck, Bay Planning Coalition; (2) *"Port of SF,"* a July 8, 2004 letter from Peter Dailey, Port of San Francisco; (3) *"Hanson,"* a July 7, 2004 letter from William Butler, Hanson Aggregates Mid-Pacific, Inc., Michael Lind, Morris Tug & Barge, Inc., and Dennis Tsuchida, RMC Pacific Materials, Inc.; (4) *"Port of Oakland,"* a July 7, 2004 letter from Jerry Serventi, Port of Oakland; and (5) *"WSPA,"* a July 8, 2004 unsigned letter from the Western States Petroleum Association. On July 10, 2004, Myron L. Shorter, Jr., Western Dock Enterprises (*"WDE"*) submitted a letter in support of the Coalition's material.

always fully consistent and sometimes are mutually inconsistent. For example, at some points the Coalition contends that BCDC should pay less attention to commercial and economic issues (BPC, p. 15 and 18; and Hanson, p. 3), while at other points the Coalition recommends the Commission should hire staff with expertise in economics (BPC, p. 21; and Port of Oakland, p. 3).

In addition to preparing this report, the staff has accepted an offer by the Bay Dredging Action Coalition to facilitate discussions between members of the Bay Planning Coalition, environmental interests and the staff for the purposes of gaining a better understanding of issues raised by the Coalition. This approach has the promise of being constructive, but it is just getting underway. As a result, the conclusions offered in this report are preliminary. These discussions may yield more definitive conclusions and recommendations in the months ahead.

The staff believes the five principal criticisms of the Coalition can be summarized as follows:

1. The Coalition believes Bay Plan Subtidal Areas Policy #2 is being misinterpreted by the staff in a manner that will prevent Bay sand mining from being permitted by BCDC in the future.
2. The Coalition believes it takes too long to get BCDC's approval of permit applications because the staff requests too much and the wrong kind of information.
3. The Coalition believes BCDC's staff plays too large a role in making and interpreting the Commission's policies and does not possess the technical expertise and management capabilities needed to make proper decisions.
4. The Coalition believes BCDC duplicates the work of other agencies.
5. The Coalition believes BCDC permits contain unreasonable conditions.

Each of these contentions is addressed in the following sections of this report.

BAY PLAN SUBTIDAL AREAS POLICY #2 INTERPRETATION

Analysis. In its initial May 14, 2004 letter and again in its July 7, 2004 submittal, the Bay Planning Coalition has placed considerable emphasis on Bay Plan Subtidal Areas Policy #2, and the staff's interpretation of this policy, which the Coalition believes will likely prevent Bay sand mining from being permitted by BCDC in the future. For reference, the policy of concern states:

> *Subtidal areas that are scarce in the Bay or have an abundance and diversity of fish, other aquatic organisms and wildlife (e.g., eelgrass beds, sandy deep water or underwater pinnacles) should be conserved. Filling, changes in use, and dredging projects in these areas should therefore be allowed only if: (a) there is no feasible alternative; and (b) the project provides substantial public benefits.*

In its May 14, 2004 letter, the Coalition raised its initial concerns about the interpretation of this Bay Plan policy. Relying on a consultant's interpretation of the policy, the Coalition asserted that this interpretation mirrors how the policy is being applied by the Commission's staff and that this interpretation is creating a significant threat to sand mining, dredging, port and marina operations, dock maintenance and the operation of other facilities throughout the Bay. To deal with these alleged problems, the Coalition requested that the policy be revoked or substantially amended and that the Commission be stripped of its authority to regulate maintenance dredging, sand mining and routine repair and maintenance activities.

In a May 28, 2004 response, BCDC's staff explained that the policy was not being interpreted in the extremist manner advanced by the Coalition, but rather in a common sense fashion

that resulted in the approval of 374 regulatory decisions, and no denials, during the two years the policy has been in effect. In the last two months, 27 more projects have been approved.

Apparently, the Coalition recognized that its initial mischaracterizations did not support its call for sweeping changes of law to deal with a problem that does not seem to exist. Therefore, in its July 7, 2004 submittal, the Coalition narrowed its focus to the possible implications of the policy as it relates to the continued viability of the sand mining industry in the Bay (BPC, p. 13; Hanson, p. 1). In particular, the Coalition is concerned that if one sand mining company—Hanson Aggregates Mid-Pacific, Inc.—has to assess the feasibility of alternatives to sand mining in the Bay, the Commission might not authorize the company to continue and expand its sand mining operations when Hanson's existing permits expire (see BPC, pp. 12-15; Hanson, pp. 1-3).

The Coalition advances a variety of arguments about the economic importance of Bay sand mining (BPC, pp. 17-18; Hanson, pp. 4-5); why BCDC should not focus on economic issues (BPC, p. 15; Hanson pp. 3-4); why BCDC should defer to the other agencies in deciding whether sand should be mined from the Bay (BPC, p. 16; Hanson, p. 4; Port of San Francisco, p. 1); how a feasibility analysis should be conducted (BPC, pp. 16-18; Hanson, pp. 3-5); and the alleged inconsequential environmental effects of sand mining (BPC, pp. 15-16; Hanson, pp. 3-4). All of this information is important, and it should be fully considered by the Commission at the time Hanson applies for a new permit for its Bay sand mining operations next year. So why is the Bay Planning Coalition, on behalf of Hanson, pressing for a Commission interpretation of the policy now?

To gain some understanding of this issue, a bit of history may be helpful. For over a hundred years, sand has been mined from the Bay bottom to provide construction material for the Bay Area. In the last three decades, there has been a substantial increase in the amount of sand mined from the Bay. Currently, four firms have approval to mine approximately two million cubic yards of sand from the Bay annually.[9] Most often the sand is mined from parts of the Bay owned by the State of California and leased to the private firms by the State Lands Commission. The miners also extract sand from one privately-owned parcel on the Bay bottom. The sand is dredged from the Bay bottom and hauled to shoreside facilities where it is processed (e.g., screened, washed and dried) and sold for use in making concrete, asphalt, fill and cover material and other uses.

Based on media reports and other public information, it appears that in the late 1990s, Hanson, a multi-national building product and aggregate firm headquartered in Great Britain, decided to enter the Bay Area market to provide sand, aggregate and other construction material. At that time, it appeared that large volumes of sand would be needed as fill material for new runways proposed at San Francisco International Airport. Hanson accomplished its entry into the regional market, in part, by purchasing local sand mining companies and, in part, by importing sand from British Columbia.

In 2002, the staff met with representatives of the sand mining industry and provided them a copy of the newly adopted Bay Plan Subtidal Areas Policy #2. This policy was crafted over a two-year period in an open and collaborative process in which the Bay Planning Coalition was a full and active participant. A panel of distinguished scientific and technical experts assisted the Commission in formulating the policy, which reflects the most current data and research about the biological importance of Bay subtidal areas. With the support of the Bay Planning Coalition, the Commission adopted policy language that is a straightforward and common sense declaration of what seems to be a reasonable conclusion: a scarce or particularly rich

[9] An illustration helps to understand how much sand is dredged from the Bay each year. Two million cubic yards of sand, if loaded into dump trucks that were parked bumper to bumper on Interstate 80, would stretch over 1,100 miles from San Francisco to the Rocky Mountains.

natural resource should not be destroyed if there is a reasonable way to avoid its destruction and the destruction provides no substantial public benefit.

In 2003, an investigation by the State Attorney General and BCDC's staff concluded that at least since 1997, Hanson and the two companies it had purchased mined sand from publicly-owned tidelands without State approval, removed more sand than authorized from areas leased by the State to the private companies and underpaid royalties to the State. These alleged violations continued at least for some period after Hanson bought the local companies. In October, 2003, the California Attorney General filed a lawsuit against Hanson and its predecessors seeking $200 million in damages to recover the value of sand allegedly illegally taken from public property and unpaid royalties owed to the State. BCDC initiated a separate enforcement action against the sand miners for alleged violations of the McAteer-Petris Act.

Also in 2003, Hanson began working with BCDC's staff to secure extensions of Hanson's sand mining permits. From Hanson's perspective, Subtidal Areas Policy #2 must have appeared quite troublesome. By importing sand to the region, Hanson had unwittingly expanded the alternatives analysis from looking at different sand mining locations within the region to considering whether it is indeed feasible to meet the Bay Area's need for construction sand without mining it from the Bay at all. Thus, the manner in which the company is operating its business raised the question of whether the Bay Plan Subtidal Areas Policy #2 could preclude the Commission from authorizing continued sand mining by Hanson in all parts of the Bay. At about the same time, a potentially large customer, San Francisco International Airport, had put off its runway project, and Hanson faced alleged violations and legal liabilities that came with acquisition of the local sand mining companies. Finally,

In response to Hanson's assertions that it could not feasibly substitute imported sand for Bay sand, BCDC's staff authorized the extension of three of Hanson's existing sand mining permits, which were set to expire in 2003. The permits were extended for two years to provide Hanson and the other Bay sand miners enough time to conduct a detailed review of the literature on the environmental impacts of sand mining. This information will help BCDC to determine whether Hanson is proposing sand mining in areas that are, in fact, scarce or have an abundance and diversity of aquatic life and habitat. The information will also be of use to the State Lands Commission, which will likely be the lead agency in the preparation of an Environmental Impact Statement for the sand miners' proposals to increase their extraction of sand from the Bay. The staff also requested that when Hanson applies for renewal of its permit, the company provide the Commission with an updated assessment of the environmental, social and economic costs and benefits of substituting other sources of sand for Bay sand.

While the staff believed this approach was beneficial to Hanson, the company obviously felt otherwise. In short order, Hanson, working through the Bay Planning Coalition, expressed its objections to the language of the policy, its possible interpretation and BCDC's authority over sand mining.

As pointed out in the staff's response to the Coalition's May 14, 2004 letter, the staff does not believe the policy precludes the Commission from authorizing future sand mining in the Bay even if some sand is imported. Nor does the staff believe the purposes of the policy are either to eliminate future sand mining in the Bay or to "export" any environmental impacts of Bay sand mining to other regions and nations. Also, the staff believes the language of the policy is flexible enough to allow it to be applied only to specific locations determined by detailed environmental studies to be "scarce in the Bay or [having] an abundance and diversity of fish, other aquatic organisms and wildlife."

Despite the staff's statements, it is clearly in Hanson's interest to not wait until next year when the company applies for a new sand mining permit to find out how the Commission interprets the policy. The Commission cannot act on an application in advance of the submission of the application. Nor can the Commission prescribe what action it will take on a permit application in the future. Therefore, the company is pressing for the policy either to be revoked

or revised in a manner that will give Hanson assurance it will be able both to continue its existing Bay sand mining operations and to significantly increase the amount of sand it mines from the Bay.

Bay Plan Subtidal Areas Policy #2 Interpretation: Conclusion. The staff believes no compelling argument has been advanced by the Bay Planning Coalition that would justify revoking or substantially amending the language of Bay Plan Subtidal Area Policy #2. When the policy was adopted in 2002, it reflected the most recent academic research available and the consensus conclusions of eminent natural resource scientists and managers. Since then, studies by the United States Geological Survey indicate that sand mining may have greater impacts on the bathymetry of the Bay than previously recognized. Therefore, the staff believes it would be completely inappropriate to revise the language of the policy simply to accommodate Hanson's business operations. However, if the Commission believes the policy language could be improved with minor refinements, this could be accomplished without undertaking a wholesale reanalysis of the scientific information underpinning the policy. Instead, the Commission could consider making minor revisions in the precise language of the policy that would be limited to those necessary to make the policy completely clear, unambiguous and consistent with the Commission's intentions. Any revision, however minor, would require the Commission to adhere to the legally required procedures for amending the Bay Plan.

As an example of the type of minor revisions the Commission could consider, the following changes to the policy would be consistent with the staff's understanding that the resource protection objectives of the policy are directed only at those activities that would substantially harm areas that are scarce or rich in aquatic life:

> *Subtidal areas that are scarce in the Bay or have an abundance and diversity of fish, other aquatic organisms and wildlife (e.g., eelgrass beds, sandy deep water or underwater pinnacles) should be conserved. Filling, changes in use, and dredging projects ~~in~~ that would substantially harm these areas should therefore be allowed only if: (a) there is no feasible alternative; and (b) the project provides substantial public benefits.*

A clarification along these lines would also bring the language of the subtidal areas policy into greater conformity with the Bay Plan policy on tidal marshes and tidal flats. The Commission adopted both policies at the same time based on the same background report. Therefore, it is reasonable that the language of both policies should be similar. Tidal Marshes and Tidal Flats Policy #1 states:

> *Tidal marshes and tidal flats should be conserved to the fullest possible extent. Filling, diking, and dredging projects that would substantially harm tidal marshes or tidal flats should be allowed only for purposes that provide substantial public benefits and only if there is no feasible alternative.*

If the Commission believes it is appropriate to consider this or other such minor amendments in the language of the policy, the Commission should direct the staff to prepare for the Commission's adoption a descriptive notice that would initiate the process of considering a possible amendment of the Bay Plan. This notice could be adopted by the Commission in about a month. A public hearing on policy refinements could be held within about three months. The Commission could vote on policy revisions within about four months. Review and approval of the changes by the Office of Administrative Law and the federal Office of Ocean and Coastal Resource Management would take an additional two to three months.

INFORMATION REQUESTS DELAY THE PERMIT PROCESS

Analysis. On the opening page of its July 7, 2004 letter, the Bay Planning Coalition cites "lack of predictability of [BCDC's] permit process" as one of its principal concerns (BPC, p. 1).

Given that all applications the Commission has received in the past six years have been approved, the Coalition's stated concern is not borne out by the Commission's record. However, upon further examination of the entirety of the Coalition's submission, it is clear that the organization's concern is not that there is any lack of predictability that applications will ultimately be approved, but rather that the Coalition believes it takes too long and the process is too onerous for gaining these approvals. The Coalition summarizes this concern under the heading of "General Factors Causing Delay: Inordinate length of time to process all types of permits, (including non-material amendments) to requests for redundant information; extraneous or irrelevant information (with no direct bearing on the environmental outcome of the project's environmental review)…." (BPC, p. 3.)

The Coalition cites 13 of the nearly 400 project approvals issued by BCDC over the past two years as evidence of this problem (BPC, pp. 3-12; Port of Oakland, p. 2-3 and attachment, p. 1-8; WSPA, attachment, pp. 1-3; and WDE, p. 2). If the cases cited by the Coalition represent all of the delays encountered by permit applicants, they would amount to a little over three percent of the applications handled by the Commission.

As previously noted, when the Commission was directed to begin cutting its budget and staff about two years ago, it was acknowledged that the cuts would inevitably lead to slower processing of permit applications and a reduced level of service to the public. The staff believes the Commission's goal should be to avoid all unnecessary delays, and all are being process within the 90-day statutory time period. But if 97 percent of permit applications are being processed with no delays, this level of service could be seen as acceptable. However, for purposes of this analysis, the staff has assumed this issue is worthy of further investigation.

When the Commission's regulatory program is viewed from a distance, four legal requirements—all of which are being met—make it difficult to accept a conclusion that BCDC's regulatory process is slow.

First, the Commission has specified in its regulations (which include Section 10310, Appendix D, BCDC's permit application form) all of the information needed for BCDC to process an application. This specificity is essential if the Commission is to meet the second legal requirement—a requirement that was put in place to advance expeditious regulatory decisions.

This second legal requirement is found in the California Permit Streamlining Act, which, in California Government Code Section 65943, provides that when an application is submitted to BCDC, the Commission's staff has a maximum of only 30 days to determine whether all of the information required by Commission's regulations has been provided. Within this 30-day period, the staff must analyze the information provided by an applicant and determine what, if any, additional information is needed to complete the application and furnish the applicant with an inventory of the information. Failure to meet the 30-day deadline results in the application being deemed complete as submitted.

The third legal requirement comes into play when a complete application has been filed with the Commission. State law—in California Government Code Section 66632(f)—requires BCDC to carry out one of the fastest land use regulatory programs in government. Specifically, once BCDC receives a complete permit application, the Commission must complete its review of the application and act on it within a maximum of 90 days. This 90-day period cannot be extended without the consent of the permit applicant. If the Commission fails to meet this statutory deadline, the application is deemed to be legally approved—without conditions. This statutory processing deadline makes the staff's determination of whether an application is complete even more important because once an application is complete and filed, it cannot be "unfiled" and no further information may be required to complete the application. Few other agencies have such short, mandated time periods to act on all applications, and fewer face such extreme consequences if they fail to act.

BCDC's regulations provide a fourth legal requirement to ensure that the Commission's regulatory process moves as swiftly as possible. Regulation Section 10353 provides that anyone who has submitted an application that the staff believes is incomplete may appeal directly to the Commission, which can overrule the staff, deem the application complete and start the 90-day clock for processing the application.

The Coalition has not contended that the staff takes more than 30 days to determine whether an application is complete. Nor has the Coalition contended that the Commission is taking longer than 90 days to act on completed applications. Therefore, if the staff is acting in a timely manner in determining whether applications are complete and BCDC is acting in a timely manner in processing completed applications, any perceived delays are not taking place within the prescribed 30-day and 90-day time limitations.

A close examination of the examples cited by the Coalition shows that this is the case. In all cases, the perceived "delays" occurred between the time applicants received so-called "30-day letters" informing them of the information needed to complete their applications and the submission of the required information to BCDC. In some cases, applicants did not provide all of the requested information so this process had to be repeated. Thus, from the staff's perspective, it appears many delays occur because applicants fail to respond fully to the staff's 30-day letters in a timely manner. Therefore, it would be reasonable to conclude that these delays are caused by the applicants rather than by BCDC's staff. However, the Coalition has come to a different conclusion: it contends it takes a long time to prepare complete applications because the staff asks for too much information—information the Coalition contends BCDC either already has, does not need, is in the possession of another agency, or goes beyond what is required by the BCDC application form (BPC, pp. 7-9).

The Port of Oakland has identified half a dozen issues that the Port believes demonstrate that BCDC's regulatory process is in need of reform (Port of Oakland, p. 1)[10] and seven specific recommendations for addressing these issues (Port of Oakland, p. 3).[11] The Port's recommendations seem largely directed at dealing with the frustrations the Port's staff experienced in working with BCDC's staff on the four permits the Port has documented in an attachment to its July 7, 2004 letter. An assessment of the complete record of the meetings, conversations, negotiations and deliberations involved in the four following examples cited by the Port of Oakland illustrates how two parties can come away from the same event with two entirely different perspectives both on what happened and on the assumed intentions of the other party. The Port's perspective seems to be that BCDC's staff purposefully delayed the Port; introduced new issues late in the negotiation process; and crafted unreasonable conditions that the Port had no choice but to accept because of time constraints over which the Port had no control. In contrast, BCDC's staff believes the record clearly shows that BCDC made special accommodations to expedite the approval of the Port's projects; the Port's staff did not address until late in the negotiation process, issues that had been pointed out early in the process; and BCDC's staff was fast, creative, and flexible in developing proposed conditions to deal with late-breaking, important issues. Each perspective appears reasonable and justified from the differing viewpoints of the Port and BCDC staffs. Just as it has been instructive for BCDC's staff to gain a fuller understanding of the Port's perspective, it may be equally instructive for the Port of Oakland to gain a better appreciation of the perspective of BCDC's staff.

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[10] The six concerns cited by the Port of Oakland are last minute changes in permit conditions; avoiding accepting applications as complete; lack of detailed engineering or biological knowledge; extensive time needed to obtain a permit; use of vague Bay Plan policies to establish new policy directions; and imposition of conditions that raise new issues without Commission action.

[11] The Port of Oakland's seven recommendations are incorporated into the list of 19 "solutions" offered by the Bay Planning Coalition, each of which is addressed on pages 18 through 22 of Attachment D.

The Port of Oakland goes so far as to suggest that BCDC's staff rejects applications as incomplete "seemingly to push back the filing of applications" (Port of Oakland, p 3). Apparently, the Port believes this technique is used to manage BCDC's workload, even though, as the Port notes, "delaying filing of an application…is…inefficient." (Port of Oakland, p. 2.) Clearly, the fastest way of processing the most permits in the shortest period of time would be to accept all applications as complete and issue permits based on a cursory review of incomplete information. However, the quality of service to the public would be unacceptable. The resources of the Bay would not be protected, other public objectives embodied in state and federal laws would not be realized and permittees would receive permits susceptible to successful legal challenge.

As a matter of course, the staff does not ask for information that is not related to specific questions in the application form or required by BCDC's regulations. In fact, the staff often works with applicants to identify those questions that are not applicable to a particular proposal to make the application process easier for both the applicants and staff. The staff understands that application processing time can affect project costs and the ability to construct a project in an economical manner. Therefore, the staff strives to meet all of its mandated deadlines and reduce processing times as much as possible. This effort seems to be largely successful in that it often results in positive comments from applicants at public hearings. However, the staff recognizes outside forces can frustrate the best of intentions. Thus, if a large number of applications or plan review submittals all arrive at the same time, undoubtedly processing times will increase.

The Bay Area oil refineries, working through an industry organization, the Western States Petroleum Association, have suggested that the BCDC permit process is resulting in unreasonable delays that are compromising their ability to import crude oil to Bay Area refineries. The refineries, as well as other Coalition members, have contended that delays in BCDC's permit process are caused by BCDC's staff requesting analyses of alternative locations where dredged material can be disposed (BPC, pp. 4-6, 9-11; WSPA, attachment, pp. 1-4).

The Long Term Management Strategy (LTMS), developed in the 1990s by federal and state agencies,[12] in full cooperation with Bay dredgers, has as its primary goal recycling dredged material so it can be used as a resource rather than treating the material as a waste product that is dumped into the Bay. Prior to the LTMS program, Bay dredging had become highly controversial due to both mounding at the main in-Bay disposal site near Alcatraz Island, causing navigational safety issues and concerns about the physical and toxic effects of in-Bay disposal on Bay resources. These issues made it very difficult to conduct dredging activities. The LTMS policies, which have been adopted by the five state and federal agencies that control Bay dredging and disposal, call for a gradual phase-down of in-Bay disposal and an increased use of the material in "beneficial reuse" projects, such as wetland creation, levee maintenance, construction and landfill cover. By adopting a process to reduce in-Bay disposal over time, and through the formation of the Dredged Material Management Office (DMMO) to expedite permit processing, the LTMS resolved the controversy and has allowed dredging to resume.

The program and policies adopted by the Commission and the other LTMS agencies to reduce in-Bay disposal, do not use mandatory allocations to decrease in-Bay disposal, so long as dredgers' voluntary actions cumulatively advance the transition to lower in-Bay disposal over time. However, the LTMS agencies have stated that regardless of any allocation program, individual dredgers would still need to use alternatives to in-Bay disposal if feasible. When

[12] The five agencies that developed the Long Term Management Strategy are the U.S. Environmental Protection Agency; the U.S. Army Corps of Engineers; the State Water Resources Control Board; the San Francisco Bay Regional Water Quality Control Board; and the San Francisco Bay Conservation and Development Commission.

alternatives to in-Bay disposal became available in recent years, the dredgers were required as part of the permitting process to begin analyzing whether they could use those alternatives.

The dredgers raised objections that they should not have to prepare these documents so long as the transition trigger volumes are not exceeded. This issue became exacerbated by the fact that dredgers used arguments in their alternative analyses that the agencies believed either: (1) had insufficient documentation to back them up (i.e., simply stating that alternatives are too expensive); or (2) were not acceptable to the LTMS agencies and would block the implementation of LTMS (i.e., air quality impacts of any alternative to in-Bay disposal). A further problem was that the staffing cuts at the agencies reduced the time that analysts could spend reviewing and advising applicants on these documents, much less proactively deal with programmatic issues. The Coalition and its members also objected to undertaking these evaluations based, in part, on their belief that the programmatic environmental documents that had been prepared to support the adoption of the LTMS fulfilled the need for individual alternative analyses. As expressed by the Coalition, "[w]e agreed the LTMS fulfill these requirements on a programmatic basis" (BPC, p. 9). The LTMS agencies noted that there was no such agreement, that the LTMS programmatic environmental documents do not fulfill this legal requirement and that an alternative analysis is required for each dredging project.

In response to the strongly stated concerns of the dredgers that preparation of the required documents was overly time-consuming and onerous, rather than dwell on legal and policy disagreements with the dredgers, the LTMS agencies decided to focus on overcoming the disagreements by developing programmatic templates that dredgers can use to develop an alternatives analyses that will meet the legal requirements of the federal Clean Water Act, the National Environmental Policy Act, the California Environmental Quality Act, and the Bay Plan. By formulating these templates, the time spent by dredgers to evaluate alternative disposal options has been cut sharply. This is borne out by the examples provided by the Coalition which cite delays encountered in the past that have been largely eliminated. The LTMS agencies are no longer requiring berth-by-berth analyses for each dredging episode, but are accepting integrated analyses that: (1) cover all of an applicants facilities; (2) only have to be reviewed only every three years; and (3) are based on the LTMS transition approach. Conoco/Philips, the Port of San Francisco, the Port of Oakland and the Corps have all completed such documents. Chevron and Valero are currently completing their analyses. Additionally, the LTMS agencies have prepared a programmatic alternatives analysis that can be applied to the entire class of small dredgers.

Despite the efforts of the LTMS agencies, a fundamental difference in perception between the LTMS agencies and the dredgers remains. The dredgers remain convinced a "deal" was struck when the LTMS was adopted, a deal that would eliminate the need for any individual alternatives analysis. The agencies contend that they were not empowered to make any "deal" that would be inconsistent with law and, therefore, no such deal was made. However, the agencies believe they have solved the dredgers' problems by developing a programmatic approach for meeting the need for individual alternatives analyses. The dredgers seem to believe any programmatic approach has to involve amending the LTMS environmental documents so they will achieve "the deal" they thought was struck a few years ago. Therefore, the dredgers are dismayed when the LTMS agencies continue to request alternatives analyses—analyses the dredgers believe the agencies agreed should not be necessary. At the same time, the LTMS agencies are disappointed because they believe the dredgers can be easily develop legally-sound alternative analyses by using the programmatic approach prepared by the agencies for the dredgers.

While the Commission's staff agrees that preparing alternative analyses was problematic in the past, the LTMS has implemented a workable solution to the issue. Further, alternatives analysis has always been an LTMS issue, rather than solely a Commission issue. Resolution of this should continue to be handled as part of the LTMS.

Clearly, additional effort is needed to overcome this continuing misunderstanding. However, the record shows the bulk of the problems cited by the Coalition deal with problems that existed in the past, and which were quickly resolved.

Information Requests Delay the Permit Process: Conclusion. Legal requirements are already in place limiting the time periods for staff review and Commission action on permit applications. These legal requirements are being met in virtually all cases. A legal mechanism also exists which provides applicants with an opportunity to appeal to the Commission staff actions on incomplete applications and for the Commission to overrule its staff. This appeal process is rarely used and may not be well known. The Commission could direct the staff to draw greater attention to this provision so applicants are made more aware of this means of dealing with any perceived staff excessiveness.

According to the Coalition and WSPA, over the past two years, the BCDC permit process has adversely affected tanker operations in three instances. To put this figure into context over 500 tankers arrive in the Bay each year. Thus, according to the Coalition and WSPA, BCDC has disrupted the operations of 3/10 of one percent of the arriving vessels.

In one of the examples cited by the Coalition and WSPA, a Chevron representative testified at BCDC's July 15th public hearing that the company was forced to "light load"[13] vessels in late 2003 due to permit delays caused by BCDC. The Commission's staff was informed of this allegation until July 13, 2004. Contrary to Chevron's earlier testimony, company representatives have since informed the staff that when the company realized additional sediment had accumulated in the Chevron's barge berths, rather than exceed the company's internal budget for dredging operations, Chevron decided to light load its barges. Although this situation has existed since November 2003, Chevron has not elected to dredge to design depths until now, even though BCDC's permit allowed for earlier dredging. Thus, the decision to light load seems to have been based on a business decision by Chevron, not on the absence of BCDC authorization for needed dredging.

In another example, WSPA contends it took a year to gain BCDC's approval for dredging at Valero's refinery in Benicia. According to WSPA, the delay forced the company to direct an incoming crude oil tanker to offload a portion of its cargo at another port (a process called "two porting"). Contrary to WSPA testimony at BCDC's July 15th hearing, an examination of the record indicates that seven months of the twelve month "delay" resulted from Valero's representative not responding to BCDC's 30-day day letter for four months, and then not providing the requested information for another three months. While awaiting information from Valero, BCDC's staff provided two interim permits to allow dredging operations to continue at Valero.

The third example also involves the Valero refinery where WSPA contends delays in securing BCDC approval for "knock down"[14] dredging at Valero's berth forced the company to light load a tanker. Upon investigation, the record shows that BCDC's staff secured approval for the dredging from the DMMO within one working day of receiving Valero's request and over a holiday weekend. The approval was verbally communicated to Valero along with an assurance that written confirmation of the approval would be provided within eight days. Upon receiving the verbal approval, Valero's staff in Benicia informed the company's corporate headquarters in Texas that there was "high confidence" the knock down operations would take place before the

[13] "Light loading" is a process where a vessel is loaded with less cargo than it can hold in order to decrease its depth in the water.

[14] "Knock down" dredging is a process where elevated areas of sediment, within an approved maintenance area, are smoothed out or knocked down into deeper areas by dragging a large beam over the high spots. No sediment is removed in this process.

tanker arrived; however, the headquarters staff had already made the decision to light load because they were concerned about getting a fully loaded tanker across Pinole Shoals.

The few inaccurate instances cited do not seem to be evidence of a wide-spread problem that would justify radical changes in the Commission operations or authority. Moreover, the record does not seem to justify either the contention that there are frequent or long delays in getting maintenance dredging permits or a conclusion that maintenance dredging permits are a major factor in any comprehensive strategy for meeting California's energy needs. Nevertheless, to further shorten dredging permit processing times without compromising the protection of the Bay's resources, the Commission could increase the time period for administratively authorized maintenance dredging from five years to ten years and could issue a regionwide permit to pre-authorize small dredging projects and knock down activities.

The fact that most of the Bay Planning Coalition's complaints are directed at perceived delays and problems with dredging permit applications and the fact that the dredging program has suffered most directly from the impacts of budget reductions lead the staff to conclude that it may be appropriate to allocate more staff resources to the dredging program. Accordingly, the two-year work program, which the staff has recommended the Commission adopt on August 19, 2004, redirects staff resources from the planning program to the dredging program. This redirection may further slow the update of the Bay Plan and compromise the currency and quality of the policies the Commission relies upon in making its permit decisions. However, in the short run, the staff believes this redirection is appropriate. Therefore, the staff recommends that the Commission approve this redirection as part of its approval of BCDC's work program for the next two fiscal years.

A final opportunity exists to address this issue on a more comprehensive basis. As part of its strategic plan, the Commission has directed the staff to update BCDC's permit application form. Staff work on this update has been underway for over a year and a public hearing is scheduled be held on revisions to the form on September 2, 2004. This hearing will provide the Commission, as well as Coalition members, other applicants and the general public with an opportunity to review the entire form in detail and identify specific provisions in the form they believe may be either unnecessary, redundant, obsolete or in need of revision.

STAFF RESPONSIBILITIES

Analysis. The Bay Planning Coalition believes BCDC's staff plays too large a role in interpreting the Commission's policies (BPC, pp. 3, 11-12, 20).[15] Further, the Coalition believes BCDC's staff does not possess the technical expertise necessary to carry out all the workload taken on by BCDC—workload the Coalition contends the Commission does not or should not have the full responsibility for undertaking (BPC, pp. 11-12, 19-21; and Port of Oakland, p. 1-3). Finally, the Coalition believes BCDC's staff is not being managed in a manner that is most effective (BPC, p. 19; Port of Oakland, p 3 and attachment, pp. 2, 6-7).

1. Policy Interpretation. The staff believes the Commission's admirable record of accomplishment over the past 39 years is, in large part, built upon the clear delineation between the role of the Commission and the role of the staff. Both the Commission and the staff are guided by the same general policies of state law[16] and the more specific policies in the *San Francisco Bay*

[15] The Coalition's stated concern deals with the staff making policy for the Commission as well as interpreting adopted Commission policies. However, the examples of this problem cited by the Coalition are limited to interpretation of the Subtidal Areas policy. While a markedly radical interpretation of an existing policy could be construed to be an all new policy, the staff has confined its analysis to the staff's role in policy interpretation.

[16] In particular, the McAteer-Petris Act, the Suisun Marsh Protection Act and the federal Coastal Zone Management Act.

Plan, which are incorporated by reference into state law. The staff applies these policies when issuing administrative permits for small projects and when formulating recommendations to the Commission for action on major permits for larger projects. The staff also prepares background technical studies which serve as the basis for proposed revisions to the findings and policies of the Bay Plan. Because the policies of the Bay Plan are both specific and mandatory, neither the Commission nor the staff has as much flexibility in dealing with a particular permit application as do other governmental bodies. BCDC's approval of an application is based on whether the project is consistent with the policies of law and the Bay Plan and not on the popular appeal of a project or the political connections of the project's proponents. This situation has insulated the Commission from extreme political pressure and allowed the Commission to make decisions based on what is in the best interest of the entire Bay region, not what is desired by a particular interest or local government.

One objective measure of the Commission's diligence, objectivity and thoroughness in administering its permit program is in the few lawsuits that have been filed against the Commission (32) and the fewer still in which the plaintiffs have prevailed (two). This record supports one observer's contention that an approval from BCDC is much like a political "Good Housekeeping Seal of Approval" for the Bay. If a majority of BCDC Commissioners, who represent diverse interests from throughout the Bay Region, agree, based on their review of an application against the policies of state law and the Bay Plan, that a project can go forward, the BCDC decision can be counted on to be both politically appropriate and legally correct.

The legacy of this approach to governance speaks for itself. The staff is both encumbered and emboldened by the detailed guidance the Commission has provided in the Bay Plan. In working with applicants, the staff can represent the Commission with great confidence because the staff knows the Commission will be guided by the same criteria that guide the staff—the policies of state law and the Bay Plan. The validity of the staff's views has been borne out by the fact that the Commission has never approved a permit application the staff recommended be denied. Therefore, both applicants and the staff can be fairly confident that if the staff finds an application acceptable, so will the Commission. This has allowed the staff to take on a role of which it is quite proud: not to find ways to deny applications, but to work with applicants to refine their projects to make them fully consistent with BCDC's policies so they can be approved. The staff believes the clearest measure of its success in fulfilling this role is that the last BCDC permit denial was in 1998. Over 1,300 regulatory approvals have followed in the ensuing five and a half years.

The staff's ability to know how the Commission will act on a particular application and the Commission's clear guidance to the staff in the form of the Bay Plan policies has allowed the Commission to delegate an ever greater range of regulatory decisions to the staff over the years. Some of this delegation has come at the recommendation of the Bay Planning Coalition, which supported the idea of expanding the list of activities that can be approved administratively, adopting regionwide permits that pre-authorize activities that were found to have de minimus impacts, and issuing abbreviated regionwide permits for very small projects. However, in taking on the responsibility for making an increasingly greater number of regulatory decisions, the staff has been called upon to make more interpretations of Commission policies. The staff has been diligent in calling to the Commission's attention instances when important or potentially controversial policy interpretations are needed. This is typically accomplished by an expanded description of a project in the administrative listing or the preparation of a draft document that is provided to the Commission for review before the document is finalized by the staff. The staff also reminds applicants of their right to elevate any disagreements with staff to the Commission for resolution. For example, the staff offered Hanson an opportunity for the Commission to hold a public hearing on the company's sand mining permits; Hanson declined.

If the Coalition truly wants the Commission to exercise more policy oversight on individual permit applications, this can best be accomplished by allowing fewer applications to be processed administratively. This would be accomplished by revising the Commission's regulations to

reduce the size, category and range of projects that have been pre-authorized or can be authorized administratively. The staff is confident this is not the Coalition's intention because it has also advocated "issuing routine permits in the most ministerial method possible" (BPC, p. 2) and have advanced a number of complaints that BCDC's regulatory process is too slow. Requiring more permits to be handled as major matters by the Commission rather than administratively by the staff would slow the process of gaining BCDC approval, especially under the current cost-cutting strategy of canceling as many Commission meetings as possible. Therefore, the staff does not recommend the Commission revise its regulations limiting the range of projects that can be approved by the staff without a public hearing and vote by the Commission because such a revision would increase the staff workload and result in delays to permit applicants.

Policy Interpretation: Conclusion. The Coalition's primary concern about BCDC's staff playing too large a role in policy interpretation seems to deal with the interpretation of Bay Plan Subtidal Areas Policy #2. The interpretation of this policy and consideration of possible refinement of the policy have been raised to the Commission in another section of this report. The staff does not believe the Coalition intended, or that it would be appropriate, for the Commission to reduce the size, category or range of projects that have been pre-authorized or can be authorized administratively. Although this would directly engage the Commission in making policy interpretations in a greater number of regulatory decisions, it would also slow BCDC's regulatory process and increase staff workload.

2. Staff Expertise and Management. The Bay Planning Coalition believes BCDC needs to develop greater staff expertise in the environmental effects and economic feasibility of alternatives to dredged material disposal (BPC, p. 21), engineering, and biology (Port of Oakland, p. 1-3). The Coalition also believes the staff should not be empowered to review, approve or reject decisions made by licensed professionals (BPC, pp. 11 and 20). Finally, the Coalition believes BCDC's staff could be managed in a manner that would be more effective in addressing the concerns raised by the Coalition. To improve staff operations, the Coalition has provided a number of quite specific recommendations, each of which is described and analyzed in Attachment D.[17]

The 30 staff members currently employed by the Commission have academic degrees in 36 fields of discipline which literally range from A to Z.[18] In addition, the Bay Plan policies require consultation with other agencies such as NOAA Fisheries, the California Department of Fish and Game, the U. S. Fish and Wildlife Service, the Metropolitan Transportation Commission, and the Regional Water Quality Control Board, among others, when special technical expertise is needed. Also, the Commission itself has representatives from other State and federal agencies in order to ensure that the Commission can address policy and technical issues that cross institutional, legal and scientific boundaries.

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[17] See Attachment D, pages 18-22.

[18] BCDC staff members have university degrees in the following fields of study: accounting; American civilization; architecture; biological and environmental studies; biology; business administration; city planning; city and regional planning; computer science; conservation and resource studies; ecology; economics; environmental and conservation biology; environmental planning; environmental planning and public policy; environmental policy and management; environmental science; environmental studies; forestry; geography; history; landscape architecture; law; marine biology; marine affairs; political science; public administration; regional planning; social sciences; urban planning; urban studies; urban watershed management; water quality; watershed restoration; wildlife; fish and conservation biology; and zoology.

As noted in a previous section, over the past two years the number of BCDC staff positions has been reduced by about a third. The staff lost in this cutback had a wide range of specialties.[19] The Coalition has not recommend that positions be added to restore BCDC's staff to its full professional strength. Instead, the Coalition has suggested that one way to deal with perceived delays in post-permit project design approvals would be for the Commission to eliminate and/or set limits on the staff's review of items submitted after a permit is issued (BPC, p. 20). Commission permits typically require the submittal of final construction drawings for the staff's review as a way of ensuring that approved projects are designed and built in accordance with the terms and conditions of the BCDC permit. These permit conditions always have a time period within which the staff must act. Therefore, the Commission has already incorporated time limits for such staff reviews in its permits.

The Coalition further recommends that the Commission should rely on design professionals hired by permittees to achieve permit compliance. Such a suggestion flies in the face of the experience gained from the Commission's enforcement program, which often has to deal with activities planned, designed, constructed, supervised or operated by licensed professionals. This recommendation also fails to acknowledge that the underlying purpose of the staff's review of documents prepared by licensed professionals is not to judge the competence of the professionals, but rather to ensure that the documents are consistent with BCDC's decisions. Also, projects often change in subtle ways between general plans submitted as part of an application and final construction drawings. Without a final review by the staff, there would be no assurance the project being built would be consistent with the Commission's approval. In addition, other items undergo staff review after permit issuance, such as public access and open space guarantees. The Commission would not be able to ensure that these guarantees are implemented adequately and consistently with Commission permits without such review.

Staff Expertise and Management: Conclusion. Despite the Coalition's contention that the Commission staff lacks the necessary expertise to properly carry out BCDC's responsibilities, the range of professional disciplines represented on the Commission's staff is impressive. Nevertheless, the Commission did lose valuable staff expertise in recent budget cuts. There is no likelihood that the Commission will be able to restore staff lost positions for at least two years, and the Commission currently has no budget for training existing staff. Therefore, as desirable as it may be, unless the Coalition is able to generate additional funding for BCDC, it is unlikely that additional professional capabilities can be added to the Commission's staff any time soon.

In reviewing of documents prepared by licensed professionals, BCDC's staff—which includes licensed professionals—is acting properly and fulfilling a role that is essential to avoid activities being undertaken in a manner inconsistent with BCDC permits. Finally, the Coalition has offered a number of specific recommendations regarding the management of BCDC and its staff. Each is analyzed in Attachment D.[20] Some have already been implemented. Variations of others are in place. Still others are inappropriate or unworkable. Recognizing that different individuals and organizations employ different management philosophies, styles and techniques, the staff believes BCDC is being managed in a fashion that can deal with the concerns raised by the Coalition.

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[19] The staff cutbacks resulted in the layoff or resignation of staff with degrees in the following disciplines: contract administration; civil engineering; environmental analysis; environmental public policy; environmental studies; geology; hydrology; land use and transportation; marine biology; planning; landscape architecture; law; resource management and environmental planning; urban planning; and urban studies.

[20] See Attachment D, pages 18-22.

DUPLICATION AND OVERLAPPING AUTHORITY

Analysis. The Bay Planning Coalition believes BCDC either duplicates the work of other agencies (BPC, p. 21), is "more appropriately within…the mandates of other agencies" (BPC, p. 3), or extends beyond BCDC's core mission and mandate and thus competes and overlaps with the mission and/or policy of others (Port of SF, pp. 1-2).

Any discussion about which government agency "should" have authority for dealing with any particular issue, project or area is sure to involve philosophy, politics, organizational theory and, quite often, strongly held ideological beliefs. At the conclusion of Congressional oversight hearings on the reauthorization of the federal Coastal Zone Management Act in 1990, after enduring long debates about which level of government—federal, state or local—should be empowered to deal with a variety of coastal issues, Congressman Gerry Studds, the chair of the House Merchant Marine and Fisheries Subcommittee, made a facetious observation along the following lines: Everyone seems to agree that the government agency they believe should have the final say on a particular issue is that agency that will give them the answer they want. The Coalition has not offered any evidence that BCDC is dealing with issues it has no authority to address. Rather, the Coalition contends that BCDC is dealing with issues the Coalition would prefer other agencies deal with, apparently in the belief that another agency will give the Coalition more of the answers it wants.

Generally speaking, government in California, as well as in most other states and the federal government, is organized along functional lines. One department focuses on transportation, another on housing, a third on water quality, and so forth. To deal with geographic areas of particularly high value or in need of special protection (e.g., San Francisco Bay, the California coastline, and Lake Tahoe), new agencies have been established to provide targeted resources and to coordinate the activities of other government agencies.

BCDC was the pioneering venture in an experiment to deal with special places. When the Commission was created in 1965, it was purposefully designed to deal with the uncoordinated and unbridled initiatives of other public agencies, and particularly local governments, which had led to the destruction of a third of the Bay. This fragmented control had the potential of destroying two-thirds of what was left of the Bay. To deal with this problem, the Commission was structured to function as a forum where all the agencies and interests having legitimate roles in the management of the Bay could come together, coordinate their activities, and advance their individual initiatives in a manner that would not compromise California's goal of protecting San Francisco Bay.

The desired coordination is achieved in two ways. First, the Commission is composed of representatives of the general public, Bay Area local governments, the state agencies that administer programs impacting the Bay, and the two federal agencies that play key roles in the management of the Bay. Second, the Commission was empowered to issue permits, and later federal consistency reviews, over other agencies and activities regulated by other agencies. In other words, BCDC was purposefully designed to overlap the authority of other agencies.

The Coalition is convinced this overlapping authority results in duplication and inefficiency. Others have found that it provides an extra level of protection and is so effective in achieving coordination that BCDC has been used as the organizational model for government authorities across the nation and around the world, from the California coast and State of Oregon, to the New Jersey Pinelands, Cape Cod, Auckland harbor, and the Inland Sea of Japan.

Duplication and Overlapping Authority: Conclusion. As has often been observed, the most important word in the name of the San Francisco Bay Conservation and Development Commission is "and." BCDC's primary role is to balance the goals of protecting the Bay with advancing the prosperity of the Bay region. Thus, BCDC is not solely an environmental protection agency; nor is it an economic development agency. It is both. To accomplish the critical balancing act, BCDC relies on, coordinates with, and in many cases, shares authority with other government

agencies whose roles are more defined and single purpose than BCDC's. Any suggestion that BCDC's organizational structure is ineffective has to overcome rather compelling evidence. The Commission's stewardship has reversed the shrinking of the Bay; it is now over 7,600 acres larger as a result of required mitigation and wetland restoration projects approved by the Commission. Around the Bay, long-range restoration programs are converting tens of thousands of acres of salt ponds and hayfields to wetlands. The Commission has also authorized over $14.4 billion in shoreline development, which has provided over 900 acres of new public access along more than 90 miles of the Bay shoreline. All of this has been accomplished at a cost to each Californian of about 10¢ a year.

Reducing duplication and overlap in government programs is a worthy goal. But, sustaining government programs that have proven to be effective is even more important.

UNREASONABLE PERMIT CONDITIONS

Analysis. The Bay Planning Coalition believes BCDC permits contain unreasonable conditions (BPC p. 20; Port of Oakland, p 3, and attachment).

The bulk of the Coalition's complaints about unreasonable permit conditions deal with two recent permits issued to the Port of Oakland. The first was an administrative permit for the expansion of the Oakland Airport and the second was for the expansion of container berth facilities. Each of these is addressed in some detail in Attachment D.[21] In both cases, the Port felt time constraints and budgetary issues "forced" the Port to accept the conditions under duress.

The first example involves the Port's application for improvements at a container berth. The Port's primary complaint appears to involve the last minute inclusion of permit conditions designed to ensure that any adverse impacts of the project on fish would be mitigated. These conditions were drafted and negotiated at the last minute, but not because of failings or delays by the Commission's staff, but rather because of three other factors. First, months earlier the Port asked that BCDC's processing of the application be suspended even though BCDC's staff advised that continuing to process the application would allow any issues to be handled without the pressures of extreme deadlines. Second, the permit condition dealt with an issue that BCDC's staff became aware of only a short time earlier. And finally, the Port requested that the Commission hold a public hearing and vote on the Port's application on the same day.

The second example involves the Port's application to expand the terminal at Oakland International Airport as part of a long-range master plan for the airport. The Port's primary complaint appears to involve how much and what type of public access needed to be provided as part of the project. The Port contends BCDC's staff insisted on adding conditions dealing with access at a time when the Port was "forced" to accept the conditions or suffer significant costs and project delays. However, the record indicates that the staff discussed the need for trail improvements as part of the airport master plan development process, a full six years prior to the submission of the airport terminal permit application. Thereafter, BCDC's staff repeatedly raised the need for trail and public access improvements to be provided as part of the terminal project in order for the staff to process the Port's application administratively, the type of processing requested by the Port's staff.

Whatever the merits of the Port's complaints, four administrative and legal mechanisms are currently in place to ensure that applicants have opportunities to address this type of issue.

First, in the case of the administrative permit, the Commission has adopted a regulation (Section 10624) allowing an applicant who objects to any term or condition in an administrative permit to appeal the matter to the Commission.

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[21] See Attachment D, pages 22-33.

Second, before issuing a major permit the Commission's chair always asks whether the applicant agrees with the recommended conditions so the applicant will have an opportunity to discuss any disagreements over conditions with the Commission.

Third, a permittee who suffers "buyer's remorse" (i.e., the permittee subsequently decides the permit includes conditions that are unacceptable) can apply to the Commission for a permit amendment to revise the troublesome language.

Finally, an applicant can file lawsuit against the Commission to challenge the legal validity of a permit condition.

Unreasonable Permit Conditions: Conclusion. Few applicants take advantage of the Commission's regulations which allow applicants to appeal conditions in administrative permits and apply for revisions of conditions in any permit. The existence of these regulations may not be well known. The Commission could direct the staff to draw greater attention to these provisions so applicants are made more aware of these mechanisms for dealing with conditions thought to be unreasonable.

The Commission could also reinstate its practice of voting on permit applications at the meeting subsequent to the hearing on the applications as a way of providing applicants and the staff more time to thoughtfully negotiate permit conditions. The staff does not believe the Coalition intended, or that it would be appropriate, for the Commission abandon its practice of voting on permit applications immediately after the hearing on the application if all issues have been resolved to the satisfaction of all interested parties. This practice has prevented unnecessary delays to applicants. But when issues remain unresolved or permit conditions are still being negotiated, experience has shown that it would be prudent for the Commission to delay voting on the application until its next meeting.

OVERALL CONCLUSION

The staff believes it is difficult not to be impressed with the resilience of BCDC as an institution over the past two years in the face of unprecedented budget cuts. Despite the Bay Planning Coalition's complaints about delays in BCDC's permit processing, mandated time deadlines have been met in all but a few cases, and the vast majority of permit applicants seem satisfied with the pace of the program. The Commission's planning program has continued to tackle emerging issues such as desalination, liquefied natural gas terminal siting, and needed Bay Plan policy updates, though not as rapidly as hoped. BCDC's enforcement program continues to monitor activities around the Bay and vigorously prosecute the violations that most seriously compromise BCDC's objectives.

Despite the overall satisfactory record of BCDC's performance, in this report the staff has attempted to objectively evaluate the complaints made by the Coalition, as well as the suggestions the Coalition believes would improve BCDC's performance. The staff has found that some of the recommended initiatives are addressed by equally effective mechanisms that are already in place. In other instances, the recommendations have already been initiated. Other of the Coalition's recommendations the staff believes are not justified or would be ineffective. The remaining ideas, along with those formulated by the staff, have been refined and advanced for consideration by the Commission. Among the ideas are some the staff believes are not justified by an unbiased analysis of the record of BCDC's performance. Nevertheless, in the interest of a full and open discussion of all possible means for making BCDC even better, they are included in this report.